

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PBM PRODUCTS, LLC,

Plaintiff,

v.

MEAD JOHNSON NUTRITION
COMPANY and MEAD JOHNSON &
COMPANY,

Defendants.

Civil Action No. 3:09cv269 (JRS)

PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

COMES NOW PBM Products, LLC, by counsel, and files this Motion for Leave to File an Amended Complaint.

FACTS AND PROCEDURAL HISTORY

1. Plaintiff PBM Products, LLC ("PBM Products") filed its original Complaint in this case on April 27, 2009. (Docket No. 1).

2. The original Complaint alleged that PBM Products manufactures, markets and distributes PBM's store brand formula.

3. In fact, PBM Products distributes store brand infant formula manufactured by PBM Nutritionals, LLC ("PBM Nutritionals").

3. PBM Products and PBM Nutritionals (collectively "PBM") are related entities that share common ownership and are under common control.

4. Based on their common efforts in the supply chain, both PBM Products and PBM Nutritionals incurred damages as a result of the false advertising that PBM alleges Defendants disseminated in this case.

5. PBM's counsel only realized that PBM Nutritionals possibly should be a party to the action during expert discovery.

6. PBM therefore seeks leave of the Court to amend its Complaint to add PBM Nutritionals as a party Plaintiff.

7. PBM has not drawn a distinction between PBM Products and PBM Nutritionals in responding to Mead Johnson's discovery requests. For example, PBM has produced documents in the possession, custody and control of PBM Nutritionals and from the files of employees of PBM Nutritionals. Further, Mead Johnson has deposed at least two officers of PBM Nutritionals.

8. This amendment will not prejudice the Defendants, nor will it delay the trial or any pretrial deadline.

9. PBM's proposed Amended Complaint is attached hereto as Exhibit A.

ARGUMENT

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend shall be freely given when justice so requires. The United States Court of Appeals for the Fourth Circuit follows the Supreme Court's mandate for a liberal reading of the Rule's "free" allowance of amendment. Ward Elecs. Serv., Inc. v. First Commercial Bank, 819 F.2d 496, 497 (4th Cir. 1987). Motions to amend are to be granted in the absence of undue delay, bad faith or dilatory motive, undue prejudice to the opposing party or futility of amendment. Id.; citing Foman v. Davis, 371 U.S. 178, 182 (1962); see also Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980).

Here, PBM Products filed the original Complaint seeking money damages and preliminary and permanent injunctive relief as the result of Defendants' false advertising. The

Complaint alleged that Defendants' false advertising adversely affects PBM's sales of store brand infant formula. PBM Nutritionals manufactures the store brand infant formula at issue in this case, while PBM Products distributes the formula. PBM Products and PBM Nutritionals share common ownership and are under common control. Based on their common efforts in the supply chain, both PBM Products and PBM Nutritionals incurred damages as a result of Defendants' false advertising.¹ PBM therefore seeks leave of the Court to amend its Complaint to add PBM Nutritionals as a party Plaintiff.

The addition of PBM Nutritionals as a party Plaintiff does not change any of the substantive allegations in the Complaint. PBM has not drawn a distinction between PBM Products and PBM Nutritionals in responding to Mead Johnson's discovery requests. The parties have already submitted their expert reports, and the addition of PBM Nutritionals as a party Plaintiff has no impact on the expert opinions. Further, the addition of PBM Nutritionals will not delay the November 2, 2009 trial or any pretrial deadlines. Therefore, Defendants will not be prejudiced by the addition of PBM Nutritionals as a party Plaintiff.

¹ There can be no question that PBM Nutritionals has standing to sue Mead Johnson for false advertising under the Lanham Act. *See, e.g., Hutchinson v. Pfeil*, 211 F.3d 515, 522 (10th Cir. 2000) (noting that Lanham Act claims are "usually asserted by manufacturers of competing products whose obvious standing is not in question").

For the foregoing reasons, PBM requests that this Court grant its Motion for Leave to File an Amended Complaint.

Respectfully submitted,

September 17, 2009

/s/ Robert F. Redmond, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2009, I will hand deliver and electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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I further certify that I will mail a copy of the foregoing via first class mail to the following non e-filing users:

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